**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **RACHAEL GUERRERO** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **STARBUCKS COFFEE COMPANY** | ) | |
| Respondent | ) | Docket No. 1,038,040 |
| | ) | |
| AND | ) | |
| | ) | |
| **AMERICAN ZURICH INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the May 3, 2010 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on July 21, 2010.

### APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Katie Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that timely written claim and claimant's average weekly wage are no longer in dispute. Thus, the ALJ's findings on those issues can be summarily affirmed.

### ISSUES

The ALJ denied the claimant compensation for lack of timely notice of her accidental injury which she concluded occurred on September 5, 2007. The ALJ went on to find that if claimant had established timely notice of her claim, her permanent impairment would be

2.5 percent to the right upper extremity[1] based upon the opinions of Dr. Ketchum, the independent medical examiner.

Claimant appeals the ALJ's Award and asks the Board to reverse her findings as to the timeliness of her notice of injury as well as her ultimate impairment rating. Claimant maintains that she sustained a series of repetitive injuries culminating in an accident on December 22 or 27, 2007, the date she orally notified her supervisor and then completed an incident report. Thus, contrary to the ALJ's findings, claimant contends she timely notified her employer of her injury and is therefore entitled to benefits. Claimant also asks the Board to modify the ALJ's findings with respect to permanency. Claimant contends her impairment is somewhere between 10 percent (Dr. Ketchum) and 23 percent (Dr. Curtis).

Respondent urges the Board to affirm the ALJ's findings. Respondent asserts the ALJ's conclusion that claimant's date of accident was September 5, 2007 was correct based upon the provisions of K.S.A. 44-508(d). Thus, claimant failed to timely notify respondent of her accident as required by K.S.A. 44-520 and the ALJ appropriately denied her claim. Alternatively, respondent argues that claimant failed to establish she sustained an accidental injury arising out of and in the course of her employment and that she likewise failed to establish that she sustained any permanent impairment as a result of any work-related injury.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts surrounding this claim are not in dispute. Claimant was employed by respondent as a barista. Her job duties included taking orders, making drinks and cleaning tables. When she took a customer's order, claimant was required to write information on the side of the cup in order to identify the individual order. Claimant often had to lift gallon containers of milk and pour them into pitchers. She also had to frequently wipe off tables and ring out the cleaning cloth.

In May 2007, claimant noticed pain in her right hand while wringing out a towel to clean off a table. Claimant testified that she sought treatment on her own with Dr. Poole from August 16, 2007 to September 5, 2007.[2] According to claimant, Dr. Poole diagnosed her with de Quervain's tenosynovitis and gave her a thumb spica splint. She was also

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[1] All of the ratings herein are to the right upper extremity.

[2] The preliminary hearing transcript referenced Dr. Cole but it appears that claimant actually said Dr. Poole. This is likely a stenographer's error. In any event, there is no dispute that claimant did seek treatment on her own during this period of time.

given an injection that provided her with some relief. Claimant testified that she told Dr. Poole her symptoms were work-related.[3] However, Dr. Poole's records are not in the record, nor is there any evidence that claimant received a copy of any of Dr. Poole's records.

Claimant says she told her store manager, John Shackelford, on December 22 or 27, 2007 that she was having problems with her hand and she needed surgery. Although there is some confusion as to the precise date this conversation took place, Mr. Shackelford believes this conversation took place on December 27, 2007.

By this time, claimant says her hand had gotten progressively worse as she worked and was constantly in pain. According to claimant, she filled out a form and was told that nothing could be done for her until she was given a physician's report and restrictions. John Shackelford confirmed that an incident report was completed during this exchange although that report is not contained within this record. Nonetheless, Mr. Shackelford does not dispute that he received notice during this conversation of a work-related injury, or that a written incident report was completed at that same time.

About this same time claimant retained an attorney and filed a claim with the Division. The E-1 was filed on December 26, 2007 and a copy was sent to respondent by the Division on December 31, 2007.

After this claim was commenced, claimant was first seen by Dr. Lynn Curtis on February 28, 2008, at the request of her attorney. He diagnosed thumb tendinitis, compression of the wrist with carpal tunnel syndrome, compression or overuse syndrome at the elbow with radial tunnel syndrome and pronator syndrome. Claimant also had shoulder complaints and neck pain.[4]

Thereafter, claimant was seen by Dr. Anne Rosenthal, at respondent's request. Dr. Rosenthal evaluated claimant on May 13, 2008. By this time, claimant had been terminated by respondent for attendance issues. She was no longer working for respondent. According to Dr. Rosenthal's records and her testimony, this examination revealed diffuse tenderness and pain in the right upper extremity with minimal findings. Dr. Rosenthal could not find anything that could be causing claimant's symptoms. She found no evidence of carpal tunnel syndrome, thoracic outlet syndrome or de Quervain's tenosynovitis. She made no recommendations for treatment and rated claimant at zero (0) percent permanent functional impairment.

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[3] P.H. Trans. at 66.

[4] Curtis Depo. at 5-7.

Lastly, claimant was examined by Dr. Lynn Ketchum, at the court's request. Dr. Ketchum examined claimant on February 18, 2009. He found claimant had mild carpal tunnel syndrome on the right and right thoracic outlet syndrome. He recommended light splinting and thoracic outlet exercises. In his report, Dr. Ketchum rated claimant at 10 percent permanent impairment to the right upper extremity.[5] However, he was of the opinion that the 10 percent impairment was not causally related to claimant's work activities with respondent. After a pre-deposition meeting with claimant's counsel Dr. Ketchum revised his opinions and testified at his deposition that more probably than not, 2.5 percent of the 10 percent impairment is attributable to her work activities. He explained that after discussing claimant's situation, he had come to the conclusion that at least a portion of claimant's repetitive work activities contributed to claimant's symptoms.[6] Even after further questioning by respondent's counsel, Dr. Ketchum steadfastly maintained that the 2.5 percent was attributable to claimant's work activities.

Dr. Curtis examined claimant a second time in August 2009. According to him, while claimant was better, she nevertheless had numbness in her fingers and continued problems with her right shoulder. He rated claimant's permanent impairment at 23 percent to the right upper extremity. This rating includes 10 percent for the mild carpal tunnel syndrome and an additional 6 percent to the right upper extremity for the scapula-coastal syndrome. He also included an additional 9 percent for lateral epicondylitis, a condition that had not been diagnosed by any other physician in this case.

In light of the parties' stipulations, the first issue to be addressed is the timeliness of claimant's notice to respondent of her injury. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[6] Ketchum Depo. at 13.

> provided in this section, or (c) the employee was physically unable to give such notice.

In order to determine whether a claimant has provided timely notice, the finder of fact must determine the legal date of accident consistent with the principles set forth in K.S.A. 44-508(d).[7]

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[8] (Emphasis added.)

The ALJ considered this issue and found as follows:

> Claimant was not taken off work by an authorized treating physician. In those circumstances then the accident date shall be the date the [c]laimant is notified in writing that the injury is work related or the date on which the employee gives written notice to the employer, whichever date is earlier. In this case, [c]laimant went to the doctor in August and September, 2007 and told the doctor that her injury

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[7] There is no dispute that this claim involves a series of microtraumas.

[8] K.S.A. 2005 Supp. 44-508(d).

> was work related. **There is not a writing informing [c]laimant of such a diagnosis. However, at least as of September 5, 2007, [c]laimant knew in her own mind that the injury to her right upper extremity was work related.** Claimant chose not to tell the [r]espondent about her injury until December 27, 2007 because of her concerns about repercussions from the [r]espondent for a work related injury. However, over three months later, December 27, 2007, [c]laimant decides to tell her employer that her problems with the right upper extremity are work related. This is more than seventy-five days after [c]laimant was aware her injury was work related. Claimant has not established just cause to enlarge the notice time from ten days to seventy-five days. Even if [c]laimant had just cause she still waited beyond the seventy-five days to give the [r]espondent notice. For that reason, this claim is not compensable and [c]laimant's request for an award of benefits is denied.[9]

The Board has considered the ALJ's reasoning and the parties' arguments and concludes the ALJ's Award must be reversed. Although it is accurate to say that claimant knew her right upper extremity complaints were caused by her work activities while working for respondent, the statute which governs the legal determination of the date of accident does not permit the claimant's subjective beliefs as to causation to impact the ultimate determination. Rather, an injured employee's date of accident is determined by objective events. Only when each of the various criteria called for in the statute cannot be established does the factfinder need to look to the entirety of the facts to find a date of accident.

Respondent maintains that none of the objective criteria were met and the ALJ appropriately looked to claimant's own admission to a physician on September 5, 2007 (that she knew work was causing her injury) in order to establish a date of accident. The Board is unpersuaded by the respondent's argument.

In this instance, claimant has testified that she told her employer of her right hand complaints and she then filled out an incident form. Although that form is not contained within the record, the fact that she filled out that form and gave it to her supervisor on December 22 or 27, 2007 is uncontroverted in the record. Moreover, Mr. Shackelford confirmed that he received written notice of the accidental injury on December 27, 2007. Thus, claimant's legal date of accident was either December 22 or 27, 2007, when she told Mr. Shackelford of her injury, completing and delivering the form to her supervisor. It follows then, that her notice of injury was timely as it was either simultaneous with the submission of her written incident report or, at most, 5 days before when she says she told Mr. Shackelford of her injury. Under these facts and circumstances, claimant's statements to a physician in September 2007 are not determinative of her date of accident. Thus, claimant did provide timely notice as required by K.S.A. 44-520. The ALJ's Award is therefore reversed on this issue. In the alternative, claimant's date of accident would be

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[9] ALJ Award (May 3, 2010) at 6.

the date the E-1 was delivered to respondent as this would have been the next date written notice was given to the employer. Utilizing this date of accident, notice would likewise have been timely given.

Having concluded the claimant's notice was timely, the Board must now turn to the balance of the parties' arguments. Respondent maintains claimant failed to establish that she sustained an accidental injury arising out of and in the course of her employment much less any permanent impairment attributable to any work-related accident. Like the ALJ, the Board is unpersuaded by respondent's contentions as to these issues.

Although the ALJ concluded claimant failed to provide timely notice, she went on to find that in the event the claim was found (on appeal) to be compensable, she would find claimant's impairment to be 2.5 percent, the impairment rating offered by Dr. Ketchum, the court's independent medical examiner. Independent of the notice issue, the ALJ was obviously persuaded that claimant had sustained an accidental injury while working for respondent and the Board agrees with this finding. Claimant's work activities were most certainly repetitive and over time they took their toll on her right upper extremity. Although Dr. Rosenthal seemed to believe claimant's complaints and her de Quervains syndrome had resolved, the balance of the medical testimony indicates claimant's symptoms and her condition persisted.

Claimant contends that Dr. Curtis provided a more persuasive and credible evaluation of claimant's symptoms, diagnosis and impairment and that the Award should be modified to reflect the 23 percent offered by Dr. Curtis. Alternatively, claimant suggests she is entitled to the entire 10 percent as opined by Dr. Ketchum.

Not surprisingly, respondent argues that claimant bears a zero percent impairment and refers the Board to Dr. Rosenthal's opinions. Succinctly put, Dr. Rosenthal testified that although claimant may have had some symptoms in her right hand and arm, those symptoms resolved and there is nothing wrong with her, other than subjective and unexplained complaints which are unrelated to her vocational activities in 2007 and 2008.

The Board has considered the parties' arguments and concludes that the 2.5 percent assigned by Dr. Ketchum adequately reflects the claimant's permanent impairment as a result of her work activities. Like the ALJ, the Board is more persuaded by his evaluation of her complaints and their connection to her work activities than by the opinions expressed by Drs. Rosenthal and Curtis. Accordingly, the Board agrees with that portion of the ALJ's Award.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated May 3, 2010, is reversed and an award of compensation is entered against respondent and in favor of claimant as follows:

The claimant is entitled to 5.63 weeks of permanent partial disability compensation, at the rate of $128.37 per week, in the amount of $722.72 for a 2.50 percent loss of use of the shoulder, making a total award of $722.72.

**IT IS SO ORDERED.**

Dated this _____ day of August 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Katie Black, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge